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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 270

EDWARD T HULSON AND WALTER A. CHRISTENSEN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Edward T. Hulson and Walter A. Christensen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on April 24, 1961, petition for rehearing having been denied on June 2, 1961.

OPINIONS BELOW.

The opinion of the District Court (App. 15-20) is reported at 27 F. R. D. 280 (1960). The opinion of the Court of Appeals, printed in the Appendix herein, *infra*, p. 13, is reported at 289 F. 2d 726 (1961).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 24, 1961 (Appendix, *infra*, p. 23). Rehearing was denied on June 2, 1961 (Appendix, *infra*, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Does Rule 60(b) give a court the jurisdiction and power to relieve a party from a judgment where a motion for a new trial and a motion for judgment notwithstanding the verdict are not made within 10 days but a motion to enlarge the ten-day period is allowed within 10 days and where counsel for the moving party, counsel for the responding party and the court itself believed in good faith that such an extension was permissible under the federal rules, particularly in view of the court's statement that he would grant a new trial if he had the jurisdiction and power to do so?

2. In the alternative, may such relief be granted by considering timely written and oral motions to extend time as motions for a new trial and judgment notwithstanding the verdict, so that the moving party is deemed to have complied with the rules?

3. Where a trial court states that justice requires a new trial, does a Court of Appeals, through Rule 60(b) or otherwise, have the jurisdiction or power to grant the new trial?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Rules 6(b), 59(b) and 60(b) of the Federal Rules of Civil Procedure are involved, all of which are reproduced in the Appendix herein, *infra*, p. 26.

STATEMENT.

This is an action for personal injuries resulting from an accident which occurred on December 22, 1957.

On June 7, 1960, the jury returned a verdict finding the defendant "Not Guilty" as to both plaintiffs and on the same day judgment was entered on the verdicts (App. 123).

On June 16, 1960, the plaintiffs served upon the defendant, and filed with the clerk of the court, a *written* motion praying that the plaintiffs be granted "a reasonable time in which *to amend their motion for a new trial* by making specific objections to specific instructions" (App. 124). An affidavit by counsel for the plaintiffs was attached to the motion in which counsel stated that he had been diligent in his efforts to secure a transcript of the instructions given to the jury and that it would be impossible to make specific objections "unless the Court sees fit to permit him *to amend his Motion for a new trial* within a reasonable time" (App. 125). This written motion for additional time *"to amend"* the motion for a new trial was served and filed within the ten-day period specified by Rule 59(b):

> "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

On June 17, 1960, the plaintiffs' attorney appeared in open court before the Honorable John F. Kilkenny, the defendant being represented by one of its attorneys, and moved the Court to act upon the written motion for extending the time for the filing of plaintiffs' amended motion for a new trial, at which time the following colloquy took place between court and counsel (App. 122-3):

> The Court: Counsel in Hulson versus Atchison, Topeka & Santa Fe, I am right in the middle of a trial here. *Your motion was filed yesterday.* I will notify you when I can hear it. Would you be available later this afternoon?

Mr. Patterson (Counsel for the plaintiffs): Yes, your Honor, *but counsel has no objection.* I am merely asking for an extension of time in which to file my motion for a New Trial.

The Court: All right, if that is all you are asking, why *the motion is granted.*

Mr. Patterson: You will extend the time for what period, your Honor?

The Court: I will extend it—When was this judgment entered?

Mr. Patterson: Ten days ago.

The Court: I see. Then *we will extend it for an additional ten days.*

Mr. Patterson: That is for the entire Motion?

The Court: That is for the filing of the Motion. Now, it is entirely possible gentlemen that *you may have to submit this on written memorandum.* I might not be here.

Mr. Patterson: I meant to inquire—under the Rules some of the Judges require we submit memoranda and briefs of authorities in support, within five days after the filing of the motion.

The Court: Well, that will be satisfactory because I probably will not be here. In any event, *you had better submit your memorandum* either with, or a short time after the filing of the motion and then, of course, you would have an opportunity to reply to that.

Mr. Svolos [Counsel for the defendant]: There is only one thing I would like to point out to the Court; *I will be gone for the next two months. I will be out on the West Coast. It would be impossible for me to argue this orally this summer.*

The Court: Well, there won't be an oral argument on it anyway because I will not be here, and I would not think you would want to come out to Oregon to argue it. (Emphasis supplied.)

It is clear from the record that counsel for the plaintiffs intended to file a short form of motion for a new trial on June 17, 1960, together with his motion "to amend" the

motion for a new trial within a reasonable extended time, but that due to the occupation of the trial judge with other matters and the acquiescence of counsel for the defendant, counsel for the plaintiff simply obtained an order extending his time for filing a motion for a new trial and for a judgment notwithstanding the verdict, and no motion for a new trial was filed on June 17, 1960.

On the same day, June 17, 1960, within the ten-day period specified by Rule 59(b) for the serving of a motion for a new trial, and within the ten-day period specified by Rule 50(b) for the making of a motion for a judgment notwithstanding the verdict, the court entered the following order (App. 125):

> "Ordered that plaintiffs' time in which to file their motion for judgment notwithstanding the verdict or, in the alternative, for a new trial be and it is hereby extended for a period of ten days, briefs of counsel to follow."

On June 27, 1960, within the period allowed by the court's order, the plaintiffs filed their motions for judgment notwithstanding the verdict or in the alternative for a new trial and, on the same day, copies thereof were served on the attorneys for the defendant (App. 7). The motion enumerated eight grounds for the entry of a judgment notwithstanding the verdict and twenty-four grounds for the granting of a new trial (App. 7-12). Filed with the motion was an affidavit by the plaintiffs' counsel stating that at no time during any pre-trial conference, or at any time prior to the opening statement by counsel for defendant, did the defendant disclose any facts tending to indicate that the defense would be predicated upon the theory of non-liability because of the acts of independent contractors (App. 13).

Four days later, on July 1, 1960, the plaintiffs filed a 38-page brief, setting forth in great detail the specific

reasons for a judgment notwithstanding the verdict and for a new trial (App. 127).

On July 8, 1960, the defendant filed affidavits (App. 127); on July 15, 1960, the defendant filed its motion to strike the plaintiffs' motion for judgment notwithstanding the verdict or for a new trial (App. 14), together with its brief in support thereof (App. 128); and on July 26, 1960, the defendant's motion to strike was taken under advisement and the plaintiffs were given 30 days to file their answering brief and the defendant was given 5 days thereafter to file its reply brief (App. 128).

On August 23, 1960, the plaintiffs filed their motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure (App. 129). On the same day, the plaintiffs filed their brief in opposition to defendant's motion to strike and in support of their motion for relief under Section 60(b) (App. 133).

On August 30, 1960, the defendant filed a reply brief (App. 133) and on September 7, 1960, the district judge entered his order (which was filed on September 13, 1960) (App. 15-20).

In his order dated September 7, 1960, allowing the defendant's motion to strike the plaintiffs' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, the District Judge said (App. 20):

> "It is with a great deal of reluctance that I arrive at the conclusion that defendant's motion to strike must be allowed. *There is considerable merit in plaintiffs' motion for a new trial and if the Court had jurisdiction, I would set aside the verdict and the judgment entered thereon, and allow the plaintiffs a new trial on the ground that the verdict was against the overwhelming weight of the evidence and that it would be necessary to set aside the judgment in order to prevent a miscarriage of justice. Altrichter* v. *Shell Oil Co.*, 8 Cir., 1959, 263 F. 2d 377." (Emphasis supplied.)

The plaintiffs filed their notice of appeal on October 4, 1960 (App. 21). On April 24, 1961, the Court of Appeals dismissed the appeal in part and affirmed it in part.

REASONS FOR GRANTING THE WRIT.

1. The Court's interpretation of Rules 6(b) and 59(b) is in conflict with the decisions of the Ninth Circuit Court of Appeals in *Yanow* v. *Weyerhaeuser Steamship Company*, 274 F. 2d 274 (9th Cir., 1959), cert. denied 362 U. S. 919, and *Daulton* v. *Southern Pacific Co.*, 228 F. 103 (9th Cir., 1955), cert. denied 352 U. S. 1005.

The Ninth Circuit Court of Appeals has held that the provision of Rule 6(b) that a district court "may not extend the time for taking any action" under Rule 59(b) does not deprive district courts of jurisdiction to enter an order extending the time. *Yanow* v. *Weyerhaeuser Steamship Company*, 274 F. 2d 274 (9th Cir., 1959), cert. denied 362 U. S. 919. There, as in the *Hulson* case, an order was entered extending the time for filing a motion for new trial, and the motion was filed within the extended period. In passing on the timeliness of the motion, the court analyzed the "distinction between cases where certain facts are strictly jurisdictional in the sense that without them the act of the court is a mere nullity, and those cases in which the facts are only quasi-jurisdictional * * *." The court concluded that the time period for filing a motion for new trial is a *quasi-jurisdictional* requisite, and that tardy filing does not deprive the trial court or the Court of Appeals of power to rule upon the merits of the motion. (274 F. 2d at 279-280.)

All courts shun deciding cases upon procedural technicalities instead of the merits, and rightly so. The literal requirements of the Federal Rules have often been relaxed where circumstances justify it. For example, in *Witt* v.

Merrill, 208 F. 2d 285 (4th Cir., 1953), counsel for plaintiff made an oral motion for new trial within 10 days after judgment, but did not file the motion in writing, as required by Rule 8(b). Holding that the oral motion was sufficient compliance with the rules, the Court of Appeals for the Fourth Circuit said (208 F. 2d at 286):

> "The liberal Rules of Civil Procedure must not be transformed by judicial interpretation into technical traps for the unwary * * *. To hold that the motion for new trial was a nullity because the grounds were not stated, even though the trial judge entertained it, continued it for purposes of argument and permitted the parties to file briefs addressed to it, would be to deny review on a technicality in contravention of the spirit of the rules."

So too, in the case at bar plaintiffs have been denied review on a technicality in contravention of the spirit of the Rules.

The Court also ruled that if "the motion for new trial is untimely, the trial court has no choice but to deny the motion * * *." (Appendix, p. 19.)

In *Daulton* v. *Southern Pacific Co.*, 228 F. 2d 103 (9th Cir., 1955), cert. denied 352 U. S. 1005, the trial court ruled upon the merits of plaintiff's motion for new trial filed more than 10 days after the entry of judgment, even though no order was entered extending the time. The Court of Appeals approved this action, pointing out that plaintiff filed a motion for relief under Rule 60(b) alleging excusable neglect.

Federal district courts are not helpless to prevent an obvious injustice. The court below had power to hear and determine plaintiffs' motion for new trial.

2. The Court's holding that Rule 60(b) is inapplicable to this case conflicts with the decision of the Court of Appeals in *Sternstein* v. *"Italia"-Societa, etc.*, 275 F. 2d 502

(2d Cir., 1960), counsel for both parties and the trial judge were unaware of the provisions of Rule 6(b), and orders were entered purporting to extend the time for filing post-trial motions. In similar cases, other Courts of Appeal have refused to permit justice to be overcome by the inadvertent and harmless delay and, consistent with the salutary purposes of the Federal Rules of Procedure, have ruled upon the merits of the case.

The Court in the present case, without adverting to the unusual construction of Rule 60(b) adopted by the District Court, summarily rejected plaintiffs' petition for relief under Rule 60(b). Contrary to the Court's conclusion, we respectfully submit that "ignorance of the rules resulting in an agreement for an unauthorized extension of time" *can* be the kind of "mistake, inadvertence, surprise, or excusable neglect" referred to in Rule 60(b). Having in mind the lack of juxtaposition between Rule 6(b) and Rule 59(b), it is understandable that counsel could fail to become aware or to recall that the 10-day time period for filing motions for new trial may not be extended.

In *Sternstein* v. *"Italian"-Societa, etc.*, 275 F. 2d 502 (2d Cir., 1960), as in the case at bar, an order was entered extending the time for filing a post-trial motion, and the motion was filed within the extended period. The Second Circuit Court of Appeals held that Rule 60(b) was available to relieve the litigant and his counsel from the rigors of Rule 6(b) and 59(b) (275 F. 2d at 503):

> "* * * The trial judge believed the interests of justice required a new trial and the record discloses that there was a proper basis for such belief. Rule 60(b) was not intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice."

See also *F. D. I. C.* v. *Alker*, 234 F. 2d 113, 116 (3rd Cir., 1956); *Daulton* v. *So. Pac. Co.*, 228 F. 2d 103 (9th Cir.,

1955), cert. denied 352 U. S. 1005; *Caraway* v. *Sain*, 23 F. R. D. 657, 659-660 (N. D. Fla., 1959).

Rule 60(b) should not be stultified by narrow construction. It provides courts with the means of securing justice in a myriad of situations. The Opinion fails to explain why it cannot be invoked to alleviate counsel from an honest, inadvertent error acquiesced in by opposing counsel and the trial court.

The chief purpose of Rule 60(b) was to prevent injustices stemming from inadvertence. If that rule does not encompass the kind of honest, understandable, harmless error which occurred here, it is difficult to imagine its proper use. The broad sweep of Rule 60(b) was recognized by the United States Supreme Court in *Klapprott* v. *U. S.*, 335 U. S. 601, 614-615 (1949), referring to subsection (6)—"any other reason justifying relief from the operation of the judgment"—

> "• • • In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

3. Substantive rights should not be defeated by a litigant's failure to meet a time limit, where defendant's counsel agreed to the extension of time for filing the motion for new trial, the District Judge entered an order extending the time, and no harm has befallen the defendant as a result of the delay. The drafters of the Federal Rules of Civil Procedure could not have intended this unjust result.

Whenever a procedural rule is permitted to defeat justice, the purpose of law is likewise defeated. In *Lott* v. *United States*, 81 S. Ct. 1563 (1961), this Court disposed of a case involving the 10-day period for taking an appeal under Rule 37 of the Federal Rules of Criminal Procedure without the necessity of resolving what this Court recog-

nized as "obscurity, if not inconsistency, in these Rules that has been exposed by this case." The Court's characterization of the contentions made by petitioners in that case apply here:

> "They contend that to hold their appeals to have been untimely * * * would be to mutilate the plain language of Rule 37(a)(2) and to make of it a trap even for the wary—including their experienced and competent counsel who were doing their best to protect petitioners' rights of appeal. And they insist that such a snare should not be permitted to deprive one of the valuable right of an appeal upon which his liberty, or even his life, may well depend."

The salutary policy of the Federal Rules should not be subverted in a case in which, through honest inadvertence, and without harm to the court or the litigants, a time limitation has been misapprehended. The courts are not powerless to grant relief in such cases, to the end that litigants' rights are adjudicated on the merits, and not on procedural niceties in a manner reminiscent of what passed for justice in days gone by.

4. Defendant should be held to be estopped to question the validity of the extension order, under the rule of *Whayne* v. *Glenn*, 114 F. Supp. 784 (W. D. Ky., 1953).

Defendant stood by in silence and permitted the District Court to enter the orders which it now claims were invalid. While "counsel cannot waive the strict requirements of the rules," in fairness defendant should be estopped to question the efficacy of the extension orders.

In *Whayne* v. *Glenn*, 114 F. Supp. 784 (W. D. Ky., 1953), revd. on other grounds, 222 F. 2d 549 (6th Cir., 1955) the defendant agreed to the entry of an order extending the time within which plaintiff could file his post-trial motion. The motion was filed within the extended period. Chief Judge Shelbourne rejected the defendant's conten-

tion that the motion was not timely and that the court could not rule upon it on the merits (114 F. Supp. at 785):

> "In view of the mutual agreements of counsel for both parties extending the time in which plaintiff could file his motion to revise and reconsider the findings of fact and conclusions of law, defendant should be held to have waived the provision of the rules requiring such a motion to be filed within ten days of the entry of judgment * * *."

The rule of *Whayne* v. *Glenn* should be applied in the case at bar.

CONCLUSION.

Beyond the harm done to individual litigants, the entire fabric of the law is injured when harmless procedural aberrations control the outcome of litigation. We urge this Court to bring the Seventh Circuit into accord with the enlightened approach to these problems reflected in the decisions of the Second, Fourth and Ninth Circuits discussed above.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

I. OPINION OF COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1960 — April Session, 1961.

No. 13186
EDWARD T. HULSON and WALTER A. CHRISTENSEN,
Plaintiffs-Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 24, 1961.

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is an action for damages alleged to have resulted from personal injuries sustained in an accident on December 22, 1957.

Edward T. Hulson and Walter A. Christensen (plaintiffs) were employed by the United States Post Office as postal transportation clerks. On December 22, 1957, together with other clerks, they began their work at 9:10

o'clock a.m. inside a railroad car, half of which was constructed and designed as a railway post office, while such car was standing on a track at the Kansas City, Missouri terminal. This car was moved from that location and coupled with other cars of The Atchison, Topeka and Santa Fe Railway Company (defendant) as a part of defendant's train No. 12. About noon that day while defendant was engaged in a switching operation wherein certain cars of this train were being moved, plaintiffs were injured as a result of being thrown against various parts of the inside of the car in which they were working.

Plaintiffs commenced this action by filing a complaint against defendant in the Circuit Court of Cook County, Illinois. They charged that their injuries resulted from negligent operation of the engine and cars by defendant. Defendant removed the cause to the United States District Court for the Northern District of Illinois, Eastern Division, on diversity grounds.

Defendant answered denying generally the allegations in the complaint. The cause was set for trial on the sole issue of liability. The trial was heard by a jury on June 6-7, 1960 with the Honorable John F. Kilkenny, District Judge, presiding.

On June 7, 1960, after the close of all the evidence, plaintiffs moved for a directed verdict. The motion was denied at that time.

On June 7, 1960, the jury returned a verdict finding defendant "not guilty" as to both plaintiffs. On the same day judgment was entered on the verdict against plaintiffs and favorable to defendant.

On June 16, 1960, plaintiffs served on defendant and filed with the clerk of the district court a written notice that they would appear before the trial court on June 17, 1960 and present a motion (copy of which was attached)

praying that the plaintiffs be "granted a reasonable time *to amend their motion for a new trial* by making specific objections to specific instructions." (Emphasis added.) An affidavit was attached to the motion by plaintiffs' counsel in which counsel stated that he had been diligent in his efforts to secure a transcript of the jury instructions and that it would be impossible to set out the specific instructions to which he objected and to state the objections thereto "unless the Court sees fit to permit him to amend his Motion for a new trial within a reasonable time." At that time no motion for a new trial had been filed by plaintiffs.

On June 17, 1960, counsel for all parties were present in court and plaintiffs' attorney orally moved the court for an order extending the time in which to file plaintiffs' motion for a new trial. Plaintiffs' counsel stated that defendant's counsel had no objection to the motion. At that time the following colloquy took place between the court and counsel in open court:

> "• • •
>
> "The Court: • • • Would you be available later this afternoon?
>
> "Mr. Patterson [plaintiffs' attorney]: Yes, Your Honor, but counsel has no objection. I am merely asking for an extension of time in which to file my motion for a New Trial.
>
> "The Court: All right, if that is all you are asking, why the motion is granted.
>
> "Mr. Patterson: You will extend the time for what period, your Honor?
>
> • • •
>
> "Mr. Svolos [defendant's attorney]: There is only one thing I would like to point out to the Court: I will be gone for the next two months. I will be out on the West Coast. It would be impossible for me to argue this orally this summer."

On the same day the court entered the following order:

> "On motion of plaintiffs, time to file motion for judgment notwithstanding the verdict or, in the alternative, for a new trial extended for a period of ten days, briefs to follow."

On June 27, 1960, for the first time, plaintiffs filed their motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. The motion set out eight grounds for entry of a judgment n.o.v. and twenty-four grounds for granting a new trial. Attached to the motion was an affidavit by plaintiffs' counsel stating in substance that at no time prior to the introduction of evidence had defendant disclosed a theory of defense based on the acts of independent contractors. On July 1, 1960, plaintiffs filed their brief in support of their motion. On July 8, 1960, defendant filed affidavits in opposition to plaintiffs' affidavit and on July 15, 1960 filed its written brief and argument in opposition to plaintiffs' motion.

On July 15, 1960, defendant filed its written motion to strike plaintiffs' motion for judgment n.o.v., or in the alternative, for a new trial. The ground for this motion to strike was that plaintiffs' motion was not filed within the time and limits prescribed by Rule 50(b) and Rule 59(b), (d) and (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A.[1] It was further stated that the trial court was prohibited from enlarging the time in which to file such motion by the provisions of Rule 6(b). Briefs were filed by both parties.

On August 23, 1960, plaintiffs filed their motion for relief under Rule 60(b). Following briefs addressed to this latter motion, on September 7, 1960, the trial court entered an order granting defendant's motion to strike plaintiffs' motion for judgment n.o.v., or in the alternative,

1. References to Rules herein are to the Federal Rules of Civil Procedure, Title 28, U. S. C. A.

for a new trial; and such motion was stricken. In a memorandum opinion filed on September 13, 1960 the trial court held that it could not grant relief to plaintiffs under Rule 60(b).

Plaintiffs filed their notice of appeal on October 4, 1960 stating that they were appealing from:

> "1. The judgment on the verdict finding the defendant not guilty, entered in this action on June 7, 1960;
>
> "2. The order denying the plaintiffs' motion for a directed verdict at the close of all of the evidence, entered in this action on June 7, 1960;
>
> "3. The order extending for a period of 10 days the time to file a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, entered in this action on June 17, 1960;
>
> "4. The order allowing the defendant's motion to strike the motion of the plaintiffs for judgment notwithstanding the verdict or in the alternative for a new trial, and striking the plaintiffs' said motion, entered in this action on September 7, 1960."

Defendant moved in this court "to dismiss paragraphs 1, 2 and 3 of the [above] notice of appeal," and we ordered the motion continued without prejudice and to be taken with the case on its merits as to the above paragraph 4.

We shall first consider defendant's motion to dismiss this appeal as to paragraphs 1, 2 and 3 in the notice of appeal.

As applied to this case, under Rule 73(a) plaintiffs were permitted to take an appeal within "30 days from the entry of the judgment appealed from." The jury verdict was received and judgment entered thereon finding defendant not guilty on June 7, 1960. The notice of appeal was filed on October 4, 1960.

Under Rule 50(b) plaintiffs were required to move for

motion for judgment n.o.v. "[w]ithin 10 days after the reception of a verdict, * * *." Plaintiffs' said motion was not filed until June 27, 1960, or 20 days thereafter.

Under Rule 59(b) "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment"; under subsection (d) the trial court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party "[n]ot later than 10 days after entry of judgment"; and under subsection (e) "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Judgment was entered on June 7, 1960, and plaintiffs' motion in question was not served until June 27, 1960.

Under Rule 6(b) the trial court "may not extend the time for taking any action under rules * * * 50(b), * * * 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

Thus, it is quite clear that plaintiffs' motion for judgment n.o.v. was not made within 10 days after the reception of the verdict and is not within the limitation imposed by Rule 50(b). Under such circumstances "the rule forbids the trial judge or an appellate court to enter such a judgment." *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48, 50 (1952); *Fountain* v. *Filson*, 336 U. S. 681, 683 (1949); *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, 574 (1948); *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 217-18 (1947); *Mickey* v. *Tremco Manufacturing Company*, 7 Cir., 226 F. 2d 956, 957 (1955).

Further, Rule 59(b), (d) and (e) prohibits a trial court from granting a motion for a new trial made after the expiration of 10 days after entry of judgment. "The trial court did not have jurisdiction to hear and pass on reasons for a new trial which were not assigned and served on the defendants within ten days after the entry of the judg-

ment." *Fine* v. *Paramount Pictures*, 7 Cir., 181 F. 2d 300, 303 (1950); *Steward* v. *Atlantic Refining Company*, 3 Cir., 235 F. 2d 570, 572 (1956). If the motion for new trial is untimely, the trial court has no choice but to deny the motion; and *the tardy motion will not toll the time for taking an appeal.* 6 Moore's Federal Practice, pp. 3851-52 (2d ed.).

The 10 day limit for filing a motion for new trial fixed in Rule 59(b) cannot be enlarged under Rule 6(b), except as provided in subsection (c) of Rule 59, and such exception has no application to the situation before us here. *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 206, note 4 (1943); *Safeway Stores* v. *Coe*, D. C. Cir., 136 F. 2d 771, 775 (1943). 6 Moore's Federal Practice, p. 3846, note 26 (2d ed.).

In order to avoid the application of the foregoing rules, plaintiffs urge this court to treat the motion for extension "to amend their motion for a new trial," served on June 16, 1960, as a motion for a new trial. The trial court did not err in rejecting this contention. Plaintiffs' motion "cannot be measured by its unexpressed intention or wants." It "should be treated as nothing but what it actually was," one to amend a motion for a new trial which was not on file and was never timely filed. *Johnson* v. *New York, N. H. & H. R. Co.*, *supra*, 344 U. S. at page 51; *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.* D. C. M. D. Penn., 19 F. R. D. 379, 381 (1956), and cases cited therein, affirmed 3 Cir., 239 F. 2d 815 (1956).

In light of the foregoing, we hold that defendant's motion to dismiss this appeal as to paragraphs 1, 2 and 3 of the notice of appeal must be sustained for lack of jurisdiction, pursuant to Rules 73(a) and 6(b).

The question raised in paragraph 4 of the notice of appeal and the denial of relief under Rule 60(b) is properly before us. This concerns the appeal from the order

of the district court entered on September 7, 1960 allowing defendant's motion to strike the motion of plaintiffs for judgment n.o.v., or in the alternative, for a new trial, and striking such motion.

Plaintiffs point to the fact that defendant's counsel agreed to the extension of time for filing their motion for judgment n.o.v., or in the alternative, for a new trial and thereby, in effect, waived plaintiffs' failure to comply with the rules. However, it is quite clear that counsel cannot waive the strict requirements of the rules. *Slater* v. *Peyser*, D. C. Cir., 200 F. 2d 360, 361 (1952); *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, *supra*, 19 F. R. D. at 381-82 and cases cited therein; 6 Moore's Federal Practice, p. 3847, note 28 (2d ed.).

Plaintiffs candidly admit that they were mistaken in understanding the requirements of the rules, but urge that counsel for all parties and the trial court in good faith believed at the time that granting the extension of time was proper and permissible under the rules. Ignorance of the rules resulting in an agreement for an unauthorized extension of time cannot serve to furnish grounds for relief under Rule 60(b), under the facts before us in this appeal.

Plaintiffs rely heavily on the following statement made by the district court in its memorandum opinion:

> "It is with a great deal of reluctance that I arrive at the conclusion that defendant's motion to strike must be allowed. There is considerable merit in plaintiffs' motion for a new trial and if the Court had jurisdiction, I would set aside the verdict and the judgment entered thereon, and allow the plaintiffs a new trial on the ground that the verdict was against the overwhelming weight of the evidence and that it would be necessary to set aside the judgment in order to prevent a miscarriage of justice. *Altrichter* v. *Shell Oil Co.*, 8 Cir., 1959, 263 F. 2d 377."

We can only conclude that this dictum on the part of the trial court serves to emphasize its conviction that it was powerless to grant the relief requested by plaintiffs.

We think the statement made by Judge Maris in *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, 3 Cir., 239 F. 2d 815, 817-18 (1956), is dispositive of the issue raised under Rule 60(b):

> "[illegible] as we have seen the defendant moved for the application of Rule 60(b), clauses (1) and (6), to its motion for a new trial. Conceding that under appropriate circumstances the district court may entertain under Rule 60(b) a motion for a new trial which is untimely under Rule 59(b) it is perfectly plain that it may do so only if a showing is made which complies with the requirements of that rule, clause (1) of which requires a showing of 'mistake, inadvertence, surprise, or excusable neglect' and clause (6) a showing of 'any other reason justifying relief from the operation of the judgment.' As we pointed out in *Federal Deposit Insurance Corp.* v. *Alker*, 3 Cir., 1956, 234 F. 2d 113, 117, Rule 60(b) provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances. Here, however, as the district court has pointed out in its opinion, the defendant's motion for the application of Rule 60(b) contained no allegations whatever which would support the granting of relief under that rule.
>
> "Since the motion for a new trial was untimely served under Rule 59(b) and no showing was made of exceptional circumstances calling for extraordinary relief under Rule 60(b) the district court did not err in striking the motion."

We hold the trial court did not err in striking plaintiffs' motion for judgment n.o.v., or in the alternative, for a new trial, and in denying plaintiffs relief under Rule 60(b).

It is ordered that this appeal be and it is hereby dismissed as to the issues raised in paragraphs 1, 2 and 3 in the notice of appeal. The order of the district court striking plaintiffs' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial and the denial of relief to plaintiffs under Rule 60(b) are affirmed.

APPEAL DISMISSED IN PART AND
AFFIRMED IN PART.

2. JUDGMENT OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, April 24, 1961.

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

EDWARD T. HULSON and WALTER A. CHRISTENSEN,
Plaintiffs-Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant-Appellee.

No. 13186

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division and on motion to dismiss appeal, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this appeal be, and it is hereby DISMISSED as to the issues raised in paragraphs 1, 2 and 3 in the notice of appeal, which paragraphs state that plaintiffs-appellants are appealing from:

"1. The judgment on the verdict finding the defendant not guilty, entered in this action on June 7, 1960;

"2. The order denying the plaintiffs' motion for a directed verdict at the close of all of the evidence, entered in this action on June 7, 1960;

"3. The order extending for a period of 10 days the time to file a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, entered in this action on June 17, 1960."

It is further ordered and adjudged by this Court that the order of the District Court entered therein on September 7, 1960, striking plaintiffs' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial and the denial of relief to plaintiffs under Rule 60(b) be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

3. ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, June 2, 1961.

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

EDWARD T. HULSON and WALTER A. CHRISTENSEN,
Plaintiffs-Appellants,
No. 13186 *vs.*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing filed by appellants in the above entitled cause, be, and the same is hereby, DENIED.

4. FEDERAL RULES OF CIVIL PROCEDURE CITED AND QUOTED.

Rule 6.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, eff. March 19, 1948.

Rule 59.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948.

RULE 60.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant

relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.